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No. 98

Supreme Court of the United States.

M. H. COURTNEY, *Appellant*,

vs.

LOUIS A. PRADT, Executor of Maurin B. Atwater, deceased, and WM. C. ATWATER, *Appellees*.

BRIEF FOR APPELLANT.

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Counsel for Appellant.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

No. 871.

Supreme Court of the United States.

M. H. COURTNEY, - - - - - - - - - - - - *Appellant,*

vs. **BRIEF FOR APPELLANT.**

LOUIS A. PRADT, EXECUTOR OF MERRITT B. ATWATER, DECEASED, AND WM. C. ATWATER, *Appellees.*

STATEMENT.

This suit was brought by M. H. Courtney, a citizen of Kentucky, against Louis A. Pradt, Executor of M. B. Atwater, deceased, a citizen of Wisconsin, and Wm. C. Atwater, a citizen of Illinois, in the Powell Circuit Court, and jurisdiction obtained by warning order and attachment. It was removed by defendants to the United States Circuit Court for the Eastern District of Kentucky. Thereupon, plaintiff moved to remand the case to the State Court, and defendants entered their appearance specially and moved to dismiss it for want of jurisdiction, and defendant, Louis A. Pradt, Executor, filed a special demurrer containing various grounds, among them that the court had no jurisdiction. The Circuit Court dismissed the suit on the ground that it had no jurisdiction, and plaintiff has appealed from that decree to this court.

The facts disclosed by the petition (Printed Record, page 1), which are confessed by the demurrer and motion to dismiss, are that M. B. Atwater & Co., a firm composed of M. B. Atwater and Wm. C. Atwater, are indebted to plaintiff, M. H. Courtney, in the sum of eight thousand dollars ($8.000) by an express contract, which sum plaintiff seeks to recover by this suit. M. B. Atwater died in 1898, having made a will, which

was probated in Wisconsin, and by which he appointed the defendant, Louis A. Pradt, his executor, who qualified there and is still acting as such executor. The Atwater & Allen Land & Lumber Company, the garnishee, is a corporation organized in Wisconsin, with power to buy, sell, own, and hold real estate in the State of Kentucky, and all of its assets consisted of real estate in the State of Kentucky. In August, 1901, it sold this real estate and realized therefrom a large sum of money. The only business ever transacted by this corporation was buying, holding, and selling this real estate in the State of Kentucky. It is alleged (R. 3) that M. B. Atwater, "at the time of his death, owned stock in said corporation, and plaintiff states that said corporation now owes to the defendant, Louis A. Pradt, executor of Merritt B. Atwater, deceased, a large sum of money as such executor. That the chief office and place of business of said corporation in the State of Kentucky is in Clay City, Powell County, Kentucky, and that said corporation has an agent resident there, upon whom summons can be served." The petition then contains the usual affidavits for an attachment and warning order against the defendants, and there is filed a separate affidavit with the petition verifying plaintiff's claim, as required under Section 2870 of the Kentucky Statutes. The petition then alleges "plaintiff knows of and states that there are no other creditors in the State of Kentucky of the said Merritt B. Atwater, deceased, and plaintiff states that there are assets in the hands of Louis A. Pradt, executor of Merritt B. Atwater, deceased, and assets of the estate of Merritt B. Atwater, deceased, in the State of Wisconsin, exclusive of the stock held by him in said corporation, and exclusive of the indebtedness of said corporation to said executor, more than sufficient in value to pay all of the debts of said estate, owing to creditors of said Merritt B. Atwater, outside of the State of Kentucky."

It is further alleged (R. 4) "that said William C. Atwater is insolvent; that the said will of Merritt B. Atwater has not

been probated in Kentucky, and that it would be unjust and inequitable to this plaintiff to permit said executor to collect, or withdraw, any of said assets arising from the sale of the said real estate in Kentucky, and distribute them under said will in a foreign jurisdiction until after plaintiff's claim against the estate of M. B. Atwater, deceased, and against said William C. Atwater, is paid in full; and that unless an attachment is granted plaintiff herein, and said assets attached and subjected by the Court to plaintiff's claims herein, they will be collected by said executor and withdrawn from the jurisdiction of this State and distributed in a foreign jurisdiction, and plaintiff will be without remedy."

This petition having been sworn to by plaintiff and filed, a warning order was issued against defendants (R. 5), and upon the execution of a bond by plaintiff an attachment issued. This was served on the Atwater & Allen Land & Lumber Co., the garnishee, who answered (R. 7), admitting that it was indebted to defendant Pradt as executor of M. B. Atwater, deceased, in the sum of $4,557.37—which sum it is holding awaiting the decision of the Court—that being the dividend declared on the stock in said corporation owned by M. B. Atwater at his death and still in his name on the books of the Company.

In appellant's brief on the motion to dismiss the appeal herein, it was argued, first, that defendants were before the Court only by constructive service of process; that as there was no actual service upon them, and no entry of appearance on their part, the United States Circuit Court had no jurisdiction to proceed in the cause, and should have remanded it to the State Court, where it originated. Second, that if the special demurrer filed by the defendant, L. A. Pradt, executor, was equivalent to his entering his appearance in the cause, still the nature of the suit against him was such that the Circuit Court could not proceed with it, it being a common-law suit, with an attachment against him, a non-

resident—the Kentucky Code giving exclusive jurisdiction to courts of equity of attachment suits against non-resident defendants—and for this reason the circuit court should have remanded the cause to the State Court. Third, that dismissing this suit for want of jurisdiction on the ground that by the laws of Kentucky a Wisconsin executor could not be sued in Kentucky, necessarily involved the question of the jurisdiction of the Circuit Court as a Federal tribunal.

There remains to be argued in this brief, the question whether or not the laws of Kentucky authorize a suit of this character against a foreign executor. If they do, then the decree of the Circuit Court dismissing this suit for want of jurisdiction was erroneous.

ARGUMENT.

It was conceded by appellees in the Circuit Court that it had jurisdiction, if the State Court had jurisdiction. This was obviously correct, unless jurisdiction was wanting and the case should have been remanded for the reasons set out in the first and second propositions stated above, as argued in appellant's brief on the motion to dismiss the appeal. Appellees contended in the Circuit Court that the State Court did not have jurisdiction on two grounds: (1). Because defendants were non-residents before the Court by constructive service only, and the corporation garnisheed was a foreign corporation. (2). Because a foreign executor could not, by the laws of Kentucky, be sued in Kentucky, or the estate of his decedent be attached.

Appellant insists that neither of these grounds is tenable, and maintains the contrary propositions as follows: (1). The statutes of Kentucky authorized the garnishment of the foreign corporation, and the Court acquired jurisdiction of the debt owing by it, notwithstanding the defendants were non-residents and before the Court by constructive service only. (2). The statutes of Kentucky authorized this suit against the foreign executor and the attachment of any assets of his decedent's estate, which might be levied on or garnisheed in Kentucky. These propositions will be discussed in their order.

I.

The Statutes of Kentucky authorized the garnishment of the foreign corporation and the Court acquired jurisdiction of the debt owing by it, notwithstanding the defendants were non-residents and before the Court by constructive service only.

This was decided by the Kentucky Court of Appeals in the recent case of Pittsburg &c. Railway Co. v. Bartels, 108 Ky. 216. One of the statutes under consideration in that case was Section 571, Ky. Statutes, which provides "All corporations,

except foreign insurance companies, formed under the laws of this or any other State, and carrying on any business in this State, shall at all times have one or more known places of business in this State and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this State, until it shall have filed in the office of the Secretary of State a statement, signed by its President or Secretary, giving the location of its office or offices in this State, and the name or names of its agent or agents thereat upon whom process can be served." This section then provides that a failure to comply with its provisions shall be a misdemeanor and the corporation and its agents and employes may be indicted and fined not less than $100.00 nor more than $1000.00 for each offense. This section was enacted in obedience to Section 194 of the present Constitution of Kentucky, which is as follows:

> "Sec. 194. All corporations formed under the laws of this State, or carrying on business in this State, shall, at all times, have one or more known places of business in this State, and an authorized agent or agents there, upon whom process may be executed, and the General Assembly shall enact laws to carry into effect the provisions of this section."

It will be observed that the provisions of both the Constitution and statute apply alike to all corporations, whether organized in Kentucky or elsewhere. The attachment in the case at bar was served on the authorized agent of the Atwater & Allen Land & Lumber Company.

It will be seen from the opinion in the Bartels case, that there, the defendant was a non-resident before the Court by constructive service only, and the corporation garnisheed was a foreign corporation, just as in the case at bar. The Court there said:

> "One Gilhooley was indebted to the appellee, Bartels, on a promissory note. The appellant railway company is a foreign corporation doing business in this

State. It was indebted to Gilhooley. This action was brought by Bartels against Gilhooley, and an order of attachment was obtained and executed upon the railway company for the purpose of compelling it, as garnishee, to pay the sum due Gilhooley to the plaintiff. As Gilhooley and the garnishee are non-residents, and the debt due from the garnishee to the debtor being payable in Indiana, and, although Bartels is a resident, it is contended that the court did not have jurisdiction to subject the debt attached to the payment of the plaintiff's demand.

"We are aware that there is some conflict between the authorities upon the question here involved, but we are of the opinion that the weight of authortities hold that the Court has jurisdiction to subject the debt to the payment of the plaintiff's demand. At any rate, the best reasoned cases take that view of the law. Non-resident corporations, under our law, are placed upon the same footing as domestic corporations. The law requires that they shall have an agent in the State upon whom process can be served. They have no right to do business in the State without having an agent or officer upon whom process can be served. They are required, in other words, to submit to the jurisdiction of the Courts of this State. They get the protection of the laws of this State, and are authorized to transact business as do similar domestic corporations, and they should not be heard to complain because they are compelled to abide by the laws of this State in matters of procedure and remedy. Gilhooley did not file an answer in the case. He was brought before the Court by constructive service. It is the railroad company that is here complaining because the Court adjudged that it should pay the money in its hands to satisfy the plaintiff's demand. Under our Code of Practice, non-residency of a debtor is a ground for an attachment. Section 203, Civil Code of Practice, designates how an order of attachment shall be served. Subsection 1 of that section provides how an attachment shall be served upon real property, subsection 2 as to how it shall be served upon personal property capable of manual delivery, and subsection 3 reads as follows: 'Upon other personal property, by delivering a copy of the order, with a notice specifying the property attached, to the person holding it; or as to a debt or demand, to the person owing it. . . . '

"Section 225 of the Code provides that if a garnishee, or officer of a corporation summoned as a garnishee, appear in person, he may be examined on oath; and if it be discovered on such examination that, at the service of the order of attachment upon him, he or the corporation was possessed of any property of the defendant, or was indebted to him, the court may order the delivery of such property, and the payment, or security for the payment, of the sum owing by the garnishee into court, etc. The language of these Code provisions shows that the legislature intended them to apply to all corporations,—foreign as well as domestic. The language does not suggest that there is to be an exception in case a foreign corporation should be indebted to a non-resident, and it is summoned as a garnishee.

"There is no question but what the debtor in this case could have come into Kentucky, and sued the railroad company to recover the amount which it owed him. The courts here would have been open to have granted such relief. If he was entitled to maintain such action, why is not his creditor, especially one who is a resident of the State, entitled to maintain an action to compel the railroad company to pay what it owes the debtor into court, to await its judgment, or to the plaintiff? The courts of Kentucky have universally recognized the right of a creditor to sue his non-resident debtor here, and attach money due him in the hands of a resident. When a foreign corporation comes into the State, and does business here, and can be sued in Kentucky, it ought to submit to the procedure and remedy of the courts of Kentucky, as a domestic corporation would be compelled to do under similar circumstances."

The court then reviews a number of authorities as sustaining its position, among them, Railway Co. v. Thompson, 31 Kan. 194, where it is said:

"A mere debt is transitory, and may be enforced wherever the debtor or his property may be found; and, if the creditor can enforce the collection of his debt in the courts of this State, a creditor of such creditor should have equal facilities."

It also quotes from Mooney v. Union Pacific R. R. Co., 60 Ia. 346, a part of which is as follows:

> "As is said in Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109, attachment laws 'necessarily assume that property has a situs entirely distinct from the owner's domicile.' . . . And we think if the defendant, Rollins, could have maintained an action against the appellant in this State for the recovery of his wages, it follows that the debt was within this State, and subject to attachment. Whether he could have maintained such action does not depend upon the question as to the custom to make payment in Nebraska, but whether appellant was subject to the jurisdiction of the courts of this State."

The conclusion reached in this case is based on sound reason; for an attachment is in the nature of a proceeding *in rem*, and as a debt is intangible and can not be physically levied on, the way, and the only way, that a court can obtain jurisdiction or control of it, is to obtain jurisdiction or control of the person of the debtor. Through the person of the debtor the court can control the debt as completely and effectually as if it were tangible property *in custodia legis*.

As held by this court in Chicago, &c., Railway v. Sturm, 176 U. S. 710, it is not at all necessary to resort to the legal fiction that a debt has a *situs;* for a debt is transitory and payable everywhere. The real thing, stripped of legal fiction, is, that jurisdiction over the debt is obtained when the court obtains jurisdiction of the person who owes it, for then the person who owes it has been notified by the court's process not to pay it to the creditor, but to hold it subject to the court's order, and the court has power to enforce its order by acting, if necessary, on the person of the debtor. This court, in the above case, used this language:

> "A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it can not be evaded by the insistence upon fictions or refinements about *situs* or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment

> of *his* creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

The Kentucky Court of Appeals, in the Bartels case, has construed the statute passed in obedience to the Constitution of Kentucky, as giving jurisdiction to Kentucky Courts of the debtor, where it is a foreign corporation with an agent in the State upon whom process can be and is served. That such construction is binding on the United States Courts, has been held by this court in Morley v. Lake Shore Railway Co., 146 U. S. 166, 167, and cases there cited, and New York, &c., Railway Co. v. Estill, 147 U. S. 591. The Bartels case is therefore a complete answer to the first contention of appellees; and appellant submits that the State Court, by virtue of the warning order against defendants and service of attachment on the foreign corporation, acquired jurisdiction of the defendant, executor, to the extent of the indebtedness admitted by the garnisheed corporation to be owing from it to him.

II.

The Statutes of Kentucky Authorized this Suit Against the Foreign Executor, and the Attachment of any Assets of his Decedent's Estate which might be Levied on or Garnisheed in Kentucky.

The statute, which appellant claims authorizes an attachment against a foreign executor, is Section 194 of the Kentucky Code of Practice, which is in this language:

> "Sec. 194. *Grounds of attachment generally.*—The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees as provided in Sec. 227, as a security for the satisfaction of such judgment as may be recovered.
>
> "I. In an action for the recovery of money against—

"1. A defendant, who is a foreign corporation, or a non-resident of the State; or,

"2. Who has been absent herefrom four months; or,

"3. Has departed herefrom with intent to defraud his creditors; or,

"4. Has left the county of his residence to avoid the service of a summons; or,

"5. So conceals himself that a summons can not be served upon him; or,

"6. Is about to remove, or has removed, his property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim, or the claims of said defendant's creditors; or,

"7. Has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; or,

"8. Is about to sell, convey, or otherwise dispose of his property, with such intent. But an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this State, for any claim other than a debt or demand arising upon a contract, express or implied, or a judgment or award."

From a mere reading of this section, it is evident that the Legislature in saying "the plaintiff may . . . have an attachment against the property of the defendant," selected the broadest possible language to describe the persons against whose property an attachment might be issued on the grounds named. The word "defendant" used in the statute is generic, and embraces all classes of persons, natural and artificial. There is no suggestion anywhere in the statute that executors, administrators, or any class of persons was intended to be excepted.

Appellees insist, however, that there must be inserted in this statute an exception in favor of executors and administrators and especially foreign executors; because, they say, an attachment gives a lien or preference, while the administration statutes require a ratable distribution of the decedent's estate; and, they say, a foreign executor can not be sued at all in Kentucky.

But before this statute was enacted the Kentucky Court of Appeals had decided repeatedly that the estate of a decedent could be attached; and that in such suit, the non-resident heirs, distributees, or legatees could be made defendants in place of the administrator, or executor, where none had qualified in Kentucky, or elsewhere. That court had also decided that a foreign executor or administrator could be sued in Kentucky. That court had also decided that a similar statute, in which the word "defendant" was used to designate the classes of persons whose property might be attached, did embrace executors and administrators, notwithstanding the administration statutes then in force were substantially the same as those of to-day. With these decisions before the Legislature—defining the word "defendant," in a similar attachment statute as embracing executors and administrators, and deciding that a foreign executor or administrator could be sued—it can not be presumed that that body intended by using the same word which had been held to *embrace* them, to *except* executors and administrators. An examination of these prior laws in force in Kentucky, and of the changes made by the Legislature, will be convincing that the present statutes authorize the suit and attachment in this case.

Looking first at the administration laws, it was not only possible, but it was a common thing until modern times for the creditor of a decedent to obtain a preference in the payment of his debt out of decedent's estate. He could do this, by being the first to recover a judgment in an action at law, or the personal representative might elect to prefer him. Williams on Executors, 3d American Ed., Vol. 2, 887.

This seems to have been the law in Kentucky until the act of 1839 was passed. It was, however, modified by the act of 1811, which provided, Section 2, that no suit should be brought against an executor or administrator until six months after his qualification; and Section 3, "That no executor or administrator shall be permitted, within such term of six

months after he, she or they may have qualified as such, to confess any judgment, or judgments, so as to give to any claim or claims a superior dignity to any other claim or claims, against the estate of their testator or intestate." 1 Statute Law of Kentucky, 673.

In Pope v. Wickliffe, 7 Mon. 413, the court held that this act did not prevent the executor or administrator from paying any creditor of the testator or intestate in full within the six months: that if the whole estate were used up by paying part of the claims in full, the other creditors had no recourse upon the executor or the administrator. So it was possible, even under this act, for a creditor to be preferred at any time.

Looking now at the former attachment laws, we find that Williams on Executors, 3 American Ed., Vol. 2, page 1711, says:

> "Executors and administrators are within the custom of Foreign Attachments: and, therefore, if a plaint be entered in the Court of the mayor or sheriff of London against an executor or administrator, the plaintiff may attach money or goods belonging to the deceased in the hands of another within the City."

In Chicago, &c., Railway v. Sturm, 174 U. S. 714, this court said: "Our attachment laws had their origin in the custom of London."

In Kentucky, it was held in Pilkington's Executrix v. Gaunt's Administratrix, 5 Dana, 410, that on a return of no property upon an execution against the estate of a decedent, a debt due to the administratrix in her representative capacity could be attached, and subjected to plaintiff's demands. This was also held in the case of Montmollin v. Gaunt's Administratrix, 5 Dana, 406. Both of these decisions were rendered in 1837, two years prior to the passage of the act of 1839. That act (3 Statute Law of Kentucky, 240), entitled "An Act to regulate the administration and settlement of estates," for the first time provided for the payment of debts ratably; but that ratable distribution was required in the single event that the

personal estate of a decedent was insufficient to pay them in full. By comparing this act with the present statutes, it will be seen that they are substantially the same in all of their provisions material to the questions here.

Section 1 provided, "That, hereafter, all debts shall be of equal dignity in the administration of estates, and shal be paid as hereafter declared ratably, in proportion to their amounts, by the executor or administrator, when the personal effects are not sufficient for the payment of the debts against the estate of the testator or intestate; and should more than the ratable share of any debt be paid, the executor or administrator shall only receive credit, in the settlement of his accounts, for its proper proportion."

Section 4 provided that burial expenses, costs and charges of administration, and the amount owing from decedent on account of an estate of a ward, idiot, lunatic or decedent, committed to him by a court of record, should be paid in full before any *pro rata* distribution should be made.

These two sections are substantially the same as section 3868 of the present Kentucky Statutes, which is as follows:

> "Sec. 3868. *Preferred debts—pro rata distribution.* If the personal estate of a decedent be not sufficient to pay his liabilities, then the burial expenses of such decedent, and the cost and charges of the administration of his estate, and the amount of the estate of a dead person, or of a ward, or of a person of unsound mind, committed by a court of record to, and remaining in the hands of a decedent, shall be paid in full before any *pro rata* distribution shall be made; but this preference shall not extend to a demand foreign to this State. All other debts and liabilities shall be of equal dignity, and paid ratably in the administration of his estate; and should more than the ratable share of any debt be paid, his personal representative shall only receive credit for its proper proportion."

Section 2 of the Act of 1839 gives the executor or administrator the right to file a bill in Chancery "where he shall be satisfied and so state in his bill that the estate is not suffi-

cient to pay all of the debts of the decedent," making the heirs, devisees, legatees, distributees and creditors of the decedent so far as known defendants.

The section then provides for referring the case to the Master to report to the court the debts against the estate, and that "the court may order the debts proved, to be paid ratably in proportion to the personal assets and slaves."

Section 5 gave the court "full power and authority to enjoin proceedings at law, and to take all necessary and proper orders for carrying this act into effect."

It also gave to any creditor, heir, devisee, legatee, or distributee the right to file a bill against the executor or administrator and the other creditors, heirs, devisees, legatees, or distributees for the settlement of the estate, and provided for similar orders and proceedings as if the bill had been filed by an executor or administrator.

Section 428, Chap. 3, Title X, of the present Kentucky Code of Practice, provides:

> "A representative, legatee, distributee, or creditor of a deceased person may bring an action in equity for the settlement of his estate."

Section 732 of the Code provides:

> "In construing the provisions of this Code, these rules shall prevail, unless a different intention be expressed, or be shown by the context:
> "18. The words 'real representative' mean the heir or devisee of real property of a deceased person.
> "19. The word 'representative' includes personal and real representatives."

The same persons, therefore, who could have brought the settlement suit under the act of 1839, can now bring it.

Section 436, Ch. 3, Title X, of the present Code, provides:

> "Upon the institution of the action mentioned in this chapter, an order may be made enjoining the prosecution of actions against the representatives of a decedent

> by creditors, for their demands. But such enjoining shall not be made, unless the action for the settlement of the estate be commenced within three years after the qualification of the personal representatives."

The same persons, therefore, who could have obtained an injunction in the settlement suit under the act of 1839, can obtain the injunction in the settlement suit under the present Code.

It is thus seen that the act of 1839 is substantially the same in all of its material provisions bearing on the question whether a decedent's estate can be attached, as the statutes in force today. Yet, under this act, the Kentucky Court of Appeals decided repeatedly that the estate of a decedent could be attached.

In Peterson v. Poignard, 6 B. M. (Ky.) 570, the Court held:

> "If the jurisdiction of the Chancellor in this case rested solely upon our statutes authorizing attachments in Chancery against the effects of non-resident debtors, we should even then be of opinion according to the case of Hefferman v. Forward, &c., decided at the present term, that as Monroe, the primary debtor of Peterson, has been dead for many years, insolvent and without administration, his heirs may in equity and for the purpose of effecting the remedy, be regarded as his representatives, qualified to contest any demand set up against him, and through whom his personal estate, existing in the form of choses in action, may be rendered subject to his debts."

In Hefferman v. Forward, 6 B. M. (Ky) 567, the facts were these:

Forward took from the possession of one Carrell a negro girl, claiming her as his own, and sold her. Carrell died, leaving a widow and two infant children, who removed from the State. Twelve months having expired without administration upon Carrell's estate, Hefferman filed his bill against Forward and the widow and unknown heirs of Carrell, to subject the

slave or her value to the payment of the demand which he set up against the estate of Carrell. The Chancellor dismissed his bill for want of jurisdiction, but the Court of Appeals reversed that judgment, holding that there was jurisdiction. It further held " . . . in a proceeding in chancery against non-residents under our statutes, that the heirs may be so far regarded as representative of the personalty as well as realty, as to authorize the proceedings against them as non-residents, in the absence of any duly appointed personal representative."

The only "proceeding in chancery against non-residents under our statutes," was then, and is now, by attachment, and this was evidently an attachment suit. The statute referred to by the court is the act of 1837, found in Session Acts, page 103, and is quoted on page 10 of appellant's brief on the motion to dismiss the appeal herein. That this was an attachment suit is also conclusively shown by the quotation in reference to it from Peterson v. Poignard, *supra*.

The court says further :

> "It would seem to be hard, therefore, and contrary to the spirit of our statutes authorizing the proceeding against non-resident debtors, etc., when the fund sought to be subjected is within the power and jurisdiction of the court, that the creditor should not be allowed to proceed against it, making all persons interested against the debt, and in the fund sought to be subjected, parties, merely because an administrator or personal representative, in whom, if appointed, the *naked* legal title would vest, has not been appointed, and therefore can not be made a party. . . .
>
> "It is true the creditor might take out letters of administration here, and in that character sue for and recover the fund sought to be subjected, or bring an action *de son tort* against the person intermeddling with the estate, and in one of these forms of proceeding he might, perhaps, be enabled to reach the fund here, sought to be applied to the payment of his debt. We do not regard either of those modes of proceeding *as an ordinary legal remedy*, which should preclude the inter-

> ference of the chancellor, in behalf of the creditor, *under the statutes referred to.*"

The court then gives several reasons why the creditor is not forced to have an administrator appointed, and why he is entitled to attach, and among them, this:

> "Besides the personalty might, in the meantime, be sent out of the State to the non-resident heirs, or the debt paid over to them or to some foreign administrator, and the fund, which should be made liable to the creditors here, escape from the power and jurisdiction of the Chancellor."

This is exactly what the petition in the case at bar alleges will happen to the fund here, unless it is subjected by the attachment.

Both of these cases were decided in 1846, about seven years after the administration act of 1839 was passed.

In Davis v. Connelly's Executor, 4 B. M. (Ky.) 136, the Court held that a foreign executor might be sued. In that case suit was brought in Kentucky, upon a judgment obtained in Ohio, against Kentucky executors of a Kentucky testator. These executors pleaded to the Kentucky suit, "that they were never appointed, qualified or admitted as such, in any Court or judicial tribunal in the State of Ohio, nor did their testator at the time, or after his death, leave assets or estate there; that the proceedings in the record in the suit declared on, were had in the State of Ohio against them as executors under the laws and within the jurisdiction of Kentucky," etc., and they claimed that the judgment against them was void because the Ohio Court had no jurisdiction to render it. It was held that this judgment was valid on two grounds: First, that executors qualified in Kentucky were executors *everywhere*, and might be sued in Ohio. Second, that having been proceeded against in Ohio as executors of Connelly and having entered their appearance in that suit as his executors, they were estopped to deny that they were his executors in Ohio. Upon the first ground the Court said:

"It is not pretended that the Court of Ohio had no jurisdiction to ascertain and adjudge the debt in question, if there were before it proper parties against whom as representatives of the deceased debtor it might be adjudged; nor is it in any manner denied that the defendants were actually before the Court, either by appearance or service of process; nor that the Court had full jurisdiction of the case and the proceeding, if they, the defendants, could be there regarded as the executors of the debtor, and proceeded against as such. And to show that this could not be, they aver that they had never qualified, etc., in Ohio, but were there foreign executors merely. And why may not a foreign executor be proceeded against in Ohio or any other State? An executor derives his authority from the will and not from the Court which grants the probate or letters testamentary. These are but the *evidences* of his right and character, and *not their cause or basis*. Having shown his election to receive the appointment by qualifying in one State, *he is executor everywhere*, and may act as such, in many respects, in other States; Fletcher's administrator v. Wier, etc. (7 Dana, 347). And as an executor, who has elected to administer, may even be sued before probate (Williams on Executors, 165), why may not an executor, who has elected to administer by qualifying in the State of the domicil, be sued in any other State, without probate or formal qualification there? . . . . .

"As executors qualified in Kentucky, they were, in fact, the representatives of the testator in Ohio."

In Atchison's Heirs v. Lindsey, 6 B. M. (Ky.) 86, it was held that although Lindsey was appointed administrator in South Carolina, and received the assets there, he could still be sued in the courts of Kentucky, and made to account for the surplus remaining in his hands at the suit of a local administrator and infant heirs of decedent. It was contended in that case that he was accountable only to the courts of South Carolina, where he was appointed administrator and received the assets. In response to that contention, the court said:

"As administrator, appointed in South Carolina, Lindsey is unquestionably amenable to her laws for his

administration of the assets found there, and is liable to be called to account there for his conduct as administrator. And although the Courts of this State may not undertake to enforce the laws of that State in this respect, they are bound to give him the benefit of them, by paying due respect to the decree of any Court of that State in the premises, and to any law of that State which may prescribe the duties of the administrator. But we do not concede, that because he was appointed administrator there, and received the assets there, he can not be held responsible to any extent, and under any circumstances, in the tribunals of this State, for the surplus remaining in his hands, and to which citizens of this State are, according to all laws, justly entitled. In the case of *Campbell* v. *Tousey*, (7 Cowan, 64), the Supreme Court of New York decided that a foreign executor coming into that State, might be sued there, and held responsible for assets in his hands in that State. In Pennsylvania the same doctrine is understood to have been maintained, in the cases of *Swearingen's Executors* v. *Pendelton's Executor* (4 Sergeant & Rawle, 389–392), *Evans* v. *Tatem* (9 do. 252–259), and *Bryan* v. *McGee* (2 Wash. Cir. Ct. R. 337). And in this Court, the cases of *Hopkins* v. *Towns* (4 B. Monroe, 124), and *Davis* v. *Connelly's Executor* (Ib. 140), seem to incline to the same doctrine. Other authorities of great weight are of a contrary tenor. But the case of *Dorsey's Executors* v. *Dorsey's Administrators* (5 J. J. Marshall, 230), decided in this Court, is directly in point to the present question, since it decides explicitly that the distributee of the decedent may enforce distribution here, if the Maryland administrator shall have removed and settled in this State (p. 282).

"Upon the express authority of this case, and under our own sense of what is required by convenience and justice, and of the comity due to the sovereignty and laws of South Carolina, we are of opinion that the mere fact that Lindsey was appointed administrator in that State, and received there the assets for which he is now charged, does not of itself exempt him from all liability to be sued in the tribunals of this State, for a claim growing out of his having thus received the assets, to the proceeds of which the complainants or some of them are entitled."

In Sherwood v. Campbell's Administrator, 1 B. M. (Ky.) 54, the court construed a statute, in which the word "defendant" was used to designate the classes of persons whose property might be attached, as embracing executors and administrators, and upheld the attachment in that case notwithstanding the administration act of 1839. The opinion in full is as follows:

> "It is the opinion of this Court, that the statute of 1838 (Session Acts, 165), conferring on justices of the peace equitable jurisdiction to subject, in a summary mode by summons, choses in action to the satisfaction of judgments under L 5 (extended to $50, by an act of 1840, Session Acts, 75), applies as well to a judgment against an administrator or executor as any other person. Both the letter and the object of this beneficial enactment apply equally to all judgments whenever there has been a proper return of *nulla bona*.
>
> "It is also our opinion that the Statute of 1839 (Session Acts, 295), entitled 'An Act to regulate the administration and settlement of estates,' does not affect the equitable remedy given by the act of 1838 for enforcing a judgment against a personal representative, unless such fiduciary, apprehending a deficit of assets, shall have instituted the comprehensive suit authorized in that event by the act of 1839, or unless some creditor had instituted the like suit in equity, as prescribed by the fifth section of the said act, and thereby all other remedies by any other individual creditor had been enjoined. Should there be a deficit of assets a proceeding under the act of 1838, or a judgment rendered thereon might still be enjoined.
>
> "Wherefore, we are also finally of the opinion that the Circuit Court erred in deciding in this case, on the appeal from the justice's judgment, that the equitable remedy prescribed by the act of 1838 does not apply to a judgment against an administrator, some of whose debtors for chattels purchased at a sale of the intestate's goods had, according to the provisions of that enactment, been cited by Sherwood after a *fi. fa.* on a judgment he had obtained for $50, against Campbell's administrator, had been returned 'no property.'
>
> "Wherefore, the judgment is reversed and the cause remanded."

The equitable remedy given by the act of 1838, referred to in this opinion, consisted in a garnishment proceeding against the debtor of the defendant. The act did not say that the executor or administrator might be defendant in such proceeding. It simply described the person whose debt might be garnisheed as the defendant. Thus, section 1 provided:

> "Section 1. Be it enacted, etc. That, hereafter, when the plaintiff or plaintiffs in an execution, which shall have been returned no property found to make the debt, or any part mentioned in said execution, when the same shall not exceed five pounds, may require the justice of the peace from whom said execution issued, to issue a summons against any person or persons who may be indebted to the defendant in said execution, to appear before him and answer, on oath, to the amount he, she or they may be owing to said defendant or defendants, or either of them, in said execution, and that said justice shall then make any order or orders that he may deem right, so as to secure the payment of the plaintiff's debt from the person or persons so summoned, provided the same shall be owing."

Section 2 provided:

> "That the defendant, or defendants, in said execution, shall be summoned to appear at the same time that the person so garnisheed shall be summoned to attend," etc.

This is the only description contained in the act of the persons whose debtors might be garnisheed, and yet the Court of Appeals decided that this description did embrace executors and administrators as well as any other person. This particular statute applied to justices of the peace only.

After that decison had been rendered, the Legislature of Kentucky changed the wording of the attachment statute, then in force, which gave jurisdiction to courts of chancery of attachments against non-residents. This statute—the act of 1837, Session Acts, page 103, section 1—described the person whose property might be attached as "person or persons, copartnership or corporation, who, or some of whom, are non-

residents of this State, or absent from the same, or the officer or officers of the corporation, who ought to be served with process, are 'non-residents of the State or absent from the same." (This section is quoted in full in Appellant's brief on motion to dismiss the appeal, page 10.) This statute, as changed by the legislature, is section 242 of the first Code of Practice, enacted March 22, 1851, and is in the following language:

> "Sec. 242. The plaintiff in a civil action may, at or after the commencement thereof, have an attachment against the property of the defendant, in the cases and upon the grounds hereinafter stated, as a security for the satisfaction of such judgment as may be recovered:
>
> "First. In an action for the recovery of money where the action is against:
>
> "1. A defendant, or several defendants, who, or some one of whom, is a foreign corporation, or a non-resident of this State, etc."

This, then, is the same description of the parties whose property may be attached as that contained in the act applicable to justices of the peace and construed in Sherwood v. Campbell's Admr. This is also the same description found in the present Code of Practice.

With the above decisions fresh before it—holding that the estate of a decedent could be attached; that a foreign executor or administrator could be sued; that where no executor or administrator had qualified, the non-resident heirs, distributees, or legatees could be made defendants in his stead and the estate be attached; that the word "defendant" in an attachment statute embraced executors and administrators—it can not be doubted that the legislature intended to embrace executors and administrators, foreign and domestic, when it deliberately changed the wording of the attachment statute so as to use the same word "defendant," which had been construed by the highest Court of the State to embrace them.

This conclusion is strengthened by the fact that the adjoining States of Ohio and Indiana, and the neighboring State,

Alabama, all had statutes, at the time of the above enactment, authorizing attachments against foreign executors and administrators.

Thus, in Mitchell's Lessee, &c., v., Eyster, 7 Ohio State, 257, an attachment against a foreign administration was sustained under the Ohio statute, providing, "in case of the debtor residing out of the State, the right of attachment, as above provided, may issue against his heirs, executors or administrators."

In Lewis v. Reed, 11 Ind. 242, it was held that under the Indiana statute (2 R. S. p. 66, section 167) "a foreign administrator is liable to be proceeded against by attachment."

And in Bank of Mobile v. McDonald, 22 Ala. 476, it was held that a foreign executor could be sued in Alabama and the estate of the decedent in Alabama be attached. The statute there provided: "And in case of the death of any debtor residing out of the limits of this State, having lands or other property herein, the creditor resident within the State shall in like manner be entitled to recover by attachment against the executors and administrators."

This conclusion is further strengthened by an examination of the other provisions of the Kentucky Statutes relative to foreign executors and administrators. They show the persistent intention of the legislature to protect home creditors and to prevent their being driven to a foreign jurisdiction to assert their claims. Thus, sections 3878 and 3879 provide that a non-resident executor or administrator of a non-resident decedent "may prosecute actions for the recovery of debts due to such decedent" on *condition*, however, that he executes bond with good surety, resident of the county in which the action is brought "conditioned to pay any debt due by his decedent to any resident of this State to the extent assets shall come to his hands."

This section, therefore, secures a preference in favor of Kentucky creditors, where no administration is taken out there,

and the foreign executor or administrator comes there to collect debts by suit.

Sections 3898 to 3900 relate to the case where a personal representative has been appointed in Kentucky to administer the estate of a non-resident. Sections 3898 and 3899 each provide for the "payment of his (decedent's) debts to citizens of this Commonwealth," as the first disposition to be made of the assets collected in Kentucky. If there is a balance after paying the debts owing the citizens of this Commonwealth, that balance, then, is to be distributed according to his last will, or, if no will, according to the law of the State of which he was an inhabitant, or it may be transmitted to the personal representative at the decedent's domicil.

Section 3900 provides:

> "If such person's estate found in this Commonwealth shall be insufficient to pay the creditors here it shall be disposed of without preference, *pro rata*, among the creditors here and such of those elsewhere as prove and demand their debts here within two years after the appointment of a personal representative here. But there must be deducted from such foreign debts the amount received, or which can be received, by the foreign creditor from assets and estate not in this Commonwealth; and if the foreign assets and estate be sufficient to pay all the foreign debts, then no part of them shall be allowed or paid here."

It is seen from these statutes and from the decisions quoted above that the policy of the State of Kentucky is to protect its own citizens and to give them a remedy in its own jurisdiction, to collect their claims against non-residents, whether dead or alive.

Appellees rely upon various decisions holding that a foreign administrator can not be sued. None of these were attachment cases. But, if it were conceded that the Kentucky Code, quoted above, does not, in ordinary cases, authorize a suit against a foreign administrator and an attachment of Kentucky assets, yet, it would not follow that it does not authorize

such suit and attachment against a foreign executor. For the title to such Kentucky assets would not be in the foreign administrator; while, on the other hand, the title to such Kentucky assets would be in the foreign executor.

This distinction, between an administrator and an executor, is clearly shown by the decisions of this Court. It is there shown that an executor derives his title from the *will*, while the administrator derives his title solely from the *government* which appoints him; that the executor derives title from the will, to the *whole* personal estate, *wherever it may be*, at the instant of the testator's death; while the administrator derives title only from the time of his appointment, and *only* to the personal estate *within the territorial jurisdiction appointing him.*

Thus in Dixon's Executors v. Ramsay's Executors, 3 Cranch. 319, in which it was held that an executor could not *sue* in a foreign jurisdiction, this difference between an executor and an administrator was shown. Chief Justice Marshall, delivering the opinion, said:

> "The question in the case is, whether the executor of a person who dies in a foreign country can maintain an action in this, by virtue of letters testamentary granted to him in his own country.
>
> "It is contended that this case differs from that of an administrator, which was formerly decided in this Court, because an administrator derives his power over the estate of his intestate from the grant of the administration; but an executor derives it from the will of his testator, which has invested him with his whole personal estate, wherever it may be.
>
> "This distinction does certainly exist, but the consequences deduced from it do not seem to follow."

The Court then holds that the executor sues, not by power from the will, but by virtue of his letters testamentary, and concludes: "No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country."

This case was followed by the Kentucky Court of Appeals in Moore v. Tanner's Administrator, 5 Mon. 46, where the Court said:

> "And the same Court, in the case of Dixon's executors against Ramsey's executors, decided that an executor can not maintain a suit in the District of Columbia upon letters testamentary granted in a foreign country: 3 Cranch. 319. After adverting to the distinction, which appears to have been taken in argument in that case between an executor and an administrator, Chief Justice Marshall, by whom the opinion of the Court was delivered, remarks: 'This distinction does certainly exist, but the consequence deduced from it does not follow. If an executor derived from the will of his testator a power to maintain a suit, and obtain a judgment for a debt due to his testator, it would seem reasonable that he should exercise that power whenever the authority of the will was acknowledged; but, if he maintains the suit by virtue of his letters testamentary, he can only sue in courts to which the power of those letters extends. It is not, and can not, be denied that he sues by virtue of his letters testamentary, and, consequently, in this particular, he comes within the principle which was decided by this Court in the case of an administrator.'
>
> "Now, if it be true—and that it is, we entertain no doubt—that an executor sues by virtue of his letters testamentary, and that those letters must be obtained from the courts of the country where suit is brought, it follows that the County Court of Caldwell, where the judgment was recovered by Tanner in his lifetime, had jurisdiction to grant probate of his will."

Again, in Stacey v. Thrasher, 6 How. 44, it was held that a judgment obtained in the State of Mississippi against an *administrator* appointed there, is not even *prima facie* evidence against the administrator of the *same decedent* appointed in Louisiana; while in Hill v. Tucker, Executor, 13 How. 458, it was held that a judgment recovered against an *executor* qualified in Virginia *was* evidence against *another executor* of the same decedent, qualified in Louisiana. These two decisions were based upon the ground that there is no privity between administrators of the same decedent appointed by

different States, but that there is privity between executors of the same decedent appointed by different States.

In Stacey v. Thrasher, this Court said :

> "The administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situated. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and, therefore, bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction. He can not, therefore, do any act to affect assets in another jurisdiction, as his authority can not be more extensive than that of the government from whom he received it."

In Hill v. Tucker, Executor, this Court said :

> "The executor's interest in the testator's estate is derived from the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions. When within the same political jurisdiction, however many executors the testator may appoint, all of them may be sued as one executor for the debts of the testator, and they may unite in a suit to recover debts due to their testator, or to recover property out of possession.
>
> "All of them, 'then,' having the same privity with each other and to the testator, and the same responsibility to creditors, though they may have been qualified as executors in different sovereignties, an action for a debt due by the testator against any one of them in that sovereignty where he undertook to act as executor, places all of them in one relation concerning it, and as to the remedies for its recovery, what one may plead to bar a recovery another may plead ; and that which will not bar a recovery against any of them, applies to all of them. Between administrators deriving their commissions to act from different political jurisdictions there is no such privity."

It is clear from these authorities that an administrator takes title solely from the government appointing him, and to assets

only within its jurisdiction. He has no title to or interest in assets in a foreign jurisdiction. An executor, on the other hand, takes title from the will, and to the assets wherever they may be, and has the right to act as to those assets in a foreign jurisdiction, subject only to the restrictions which may be imposed by that foreign jurisdiction as a condition precedent to his acting.

It is clear from the cases above, that an administrator would have no right to sue as such in a foreign government, for he has no title to the assets in such foreign government. It is equally clear that an executor would have no right to sue in such foreign government, although he has title to the personalty there, *until* he first complied with the conditions imposed upon him by that government; for while the title is in him from the will, yet, as said in Dixon's Executor v. Ramsay's Executor, *supra*, "No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country."

Now, if it be conceded that a suit will not lie under the Kentucky Code against a foreign administrator who is out of the State, to attach property in the State, such concession can be made only upon the ground that such foreign administrator has no title to property in the State, and, therefore, is not a party in interest or a proper party. This reason does not apply to a foreign executor, for, as has been shown by the decisions of this Court, as well as by Davis v. Connelly (Ky.), *supra*, he takes title under the will to property everywhere, subject only to such restrictions as may be imposed by the foreign government. Where, however, a proper case arises against a foreign administrator, appellant insists that the statute does authorize a suit against him with an attachment. For example: Suppose an Indiana administrator should be passing through Kentucky with assets collected in Indiana, on his way to some foreign country for the purpose of defrauding the decedent's creditors, could it be doubted that such Indiana

administrator could be proceeded against by attachment in Kentucky? Suppose another case: That an Indiana administrator had come into Kentucky, and had there collected, without suit, debts due the decedent and was about to depart to Indiana without paying decedent's Kentucky creditors. It could not be doubted that in such case an attachment would lie, under the statute, against the Indiana administrator. In the case at bar the foreign executor has title as such executor to the debt garnisheed; he is a non-resident of the State, and it is alleged that he will collect and withdraw the debt from the jurisdiction of Kentucky, unless the attachment is granted. Why, then, is this not a proper case for the Code provisions to apply? It will not do to contend that because an executor can not sue in a foreign government unless he complies with its statutes, that, therefore, he can not be sued there, for the right to sue and the liability to be sued are not correlative. The very policy which requires the foreign government to impose conditions on his suing there, also requires that its citizens shall have the right to sue him there as to the assets subject to its control, for that policy is for the protection and benefit of its citizens. This is held by various authorities, among them Tunstall, etc., v. Pollard's Administrator, 11 Leigh (Va.) 1, where President Tucker, in a luminous opinion, says:

> "It is admitted, without qualification, that a foreign administrator has no right to sue. And it seems to be supposed, that the exemption from liability to suit is the correlative of this proposition. *By no means*; our courts do not, indeed, recognize the right of a foreign administrator to withdraw the assets from this jurisdiction. It is clear, that as a *matter of right*, the power of the foreign jurisdiction does not extend over the assets which are beyond it, and that, of course, a grant of administration by it can not give a right or title to an administrator over assets beyond the territory of the government which grants it. Moreover, as a matter of policy, and of duty to our own citizens, the withdrawal of the assets should not be permitted to the prejudice of creditors in our own country;

who might thereby be compelled to seek their remedy in the domicil of the foreign executor, and there perhaps meet with obstructions and inequalities in the enforcement of their rights from the peculiarities of the local laws: Story's Conf. of Laws, pp. 421-422. But these considerations have no bearing against the suability of the executor. So far from it, they would demand, that the foreign executor who comes here with the assets should be held liable to the action of creditors for their debts, or of legatees for what is due them.

"If it is the duty of every sovereignty to provide for the security of its own people, it is as much bound to enforce justice in their behalf from an executor who is within its jurisdiction, and has also within it the assets out of which they have a right to payment, as it is to prevent a foreign administrator from recovering and withdrawing the assets which are within its power. It is obvious, therefore, that so far from the power to sue and the liability to be sued being *correlative*, they are rather antagonizing; as the same reasons which forbid the first, very strongly sustain the last."

It would seem that the *right to defend* is the true correlative of the liability of the foreign executor to be sued, and, as the foreign executor is never denied *this right*, he should have no cause to complain when sued in a government *having jurisdiction of the assets*. The case of Moss v. Rowland, &c., 3 Bush, 506, is a distinct authority to the effect that a foreign executor, sued in Kentucky, is not required to execute any bond in order that he may *defend*.

Authorities Relied Upon by the Lower Court.

Coming now to the cases relied upon by the lower Court, in its opinion, we find the first case is that of Vaughn v. Northrup, 15 Pet. 1.

The facts in this case were that an administrator appointed by Kentucky, the State of the domicil of decedent, collected a claim due his decedent from the United States. Suit was brought in the District of Columbia by "appellants' claiming to be the next of kin, and heirs of the intestate, for their distributive

share of the said money, against Northrup as administrator; and the other defendants, who are made parties, are asserted to be claimants, as next of kin and distributees." The suit was dismissed for want of jurisdiction. Judge Story, in delivering the opinion affirming the case, said:

> "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other countries. It can not confer, as a matter of right, any authority to collect assets of the deceased in any other State; whatever operation is allowed to it, beyond the original territory of the grant, is a mere matter of comity, which every nation is at liberty to yield or withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is exclusively bound to account for all the assets which he received under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of other States have no right to interfere with or to control the application of those assets, according to the *lex loci*."

The assets referred to here, "which the tribunals of other States have no right to interfere with or to control," are evidently meant assets *within the jurisdiction of the appointing government* and *not* assets within the jurisdiction of other States. This is conclusively shown from a further examination of the Opinion.

The Opinion proceeds:

> "*Hence*, it has become an established doctrine that an administrator, appointed in one State, can not, in his official capacity, sue for any debts due to his intestate in the courts of another State; and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor, for any debts due there by his intestate. The authorities to this effect are exceeding numerous, both in England and America. . . . But it has been suggested that the present case is distinguishable, because the assets sought to be distributed were not collected in Ken-

> tucky, but were received as a debt due from the government at the Treasury Department at Washington, and so constituted local assets within this District."

The Court then decides that debts due from the Government of the United States have no locality at the seat of government, and that these were not local assets in the District of Columbia, but Kentucky assets. This shows, conclusively, that all that this case decided was, that a Kentucky administrator could not be sued in the District of Columbia, and made to account there for Kentucky assets. It does not decide that such an administrator could not be sued in the District of Columbia for local assets within that jurisdiction, which the Kentucky administrator had collected there.

The next case relied upon by the lower Court is that of Marrett v. Babb's Exr., 91 Ky. 89. There a foreign executor had contracted to sell land in Kentucky, under an implied power given him by the will to sell this land for the payment of debts. He brought suit for specific performance of the contract against the purchaser. The court decides first, that this foreign executor qualified in Massachusetts, but not qualified in Kentucky, *had power to make the sale*, for *this* power was *derived from the will.* And second, that this foreign executor had *no right* to institute this suit for specific performance, because he had not qualified in Kentucky, the *right to sue being derived from the letters testamentary.* The Court, after quoting the provisions of the statutes applicable, says:

> "Thus we see that a non-resident executor can not even sue to collect a debt of the testator, unless he first complies with this statutory provision, the conditions upon which he is allowed to do so being, as the law originally enacted plainly shows, *intended for the protection of residents of this State.* His qualification as executor in a sister State does not authorize him to administer the assets here, or act otherwise in our courts as such representative. (Citing cases.) He must take out letters testamentary from the proper court in this State, or comply with the provisions of the statute *supra*, if merely the collection of a debt due the decedent is sought."

If, then, the foreign executor was denied the right to enforce by suit a valid contract made by him until he qualified in Kentucky and if the denial of this right to sue was for the *reason* that the policy of that law was "intended for the protection of residents of this State," then it would seem that the *same reason* would demand that a resident of this State should be allowed to sue a foreign executor who has not qualified, but who is about to withdraw the assets from this State to the detriment of resident creditors.

It is clear that the restrictions imposed by the Legislature of Kentucky for the benefit of its own citizens upon the right of the foreign executor to sue there, have no application to his suability there.

The next case is that of Maysville St. R. R. & T. Co. v. Marvin, 59 Fed. Rep. 91. It holds that a foreign administrator could not sue at all in Kentucky to recover an asset of the estate which did not constitute a debt due the decedent. This is another case where a foreign administrator attempted to sue in Kentucky, and was not allowed to do so because of the policy of the State in protecting home creditors. The Court there said:

> "The policy underlying the rule which refuses recognition of letters of administration in a State other than that in which they were granted is founded upon the inconvenience of allowing assets to be taken from one State into another, until domestic creditors are satisfied. . . . The act relating to suits by foreign administrators carefully guards and protects the rights of domestic creditors. Is it to be presumed that, by the use of the general designation 'personal representative,' the legislature intended to so radically change the whole policy of the State as to permit this class of claims to be prosecuted by foreign administrators, without any protection to domestic creditors? What authority is there to require a bond conditioned as required by section 44 of chapter 39? We know of none. . . . Why should it be assumed that the legislative intention was that this asset might be recovered by a foreign administrator, and the recovery removed to the State of administration? With reference

to other assets—such as debts due to the decedent—a very different policy was enforced, and domestic creditors fully protected against the effect of recognizing foreign appointments. Why such a discrimination?"

It is thus seen that the chief argument against construing the statute as allowing a foreign administrator to recover, was that there was no provision made for the protection of home creditors; and, therefore, the Court concluded that the legislature did not intend that this particular asset, any more than any other asset, should be removed from the State of Kentucky, because no provision had been made in the statute for giving bond, and thus protecting Kentucky creditors.

The case of L. & N. R. R. Co. v. Brantley's Admr., 96 Ky. 300, decides the same question.

The last case relied upon by the lower Court is that of Smith v. Baker, 3 Met. 264. This case does decide that as a general rule, a foreign administrator can not be sued in Kentucky, and that in this particular case, there is nothing to bring it within the exceptions to this rule. The facts and decision in this case, as disclosed by the opinion, were that "the debtor died in another State, the administrator having been appointed and qualified there, and being a resident of such State, no action can be maintained against such foreign administrator in the courts of this State, by a creditor of his intestate."

In this case, the administrator had not brought with him to Kentucky any assets from the State of his appointment, nor had he collected or attempted to collect or to interfere with Kentucky assets, nor, in fact, were there any assets in Kentucky, so far as the opinion discloses. In other words, it was a plain suit to recover a personal judgment against a foreign administrator, and not a suit to subject by attachment any particular assets. This case does recognize as "well settled doctrine" that "an administrator or executor, who is appointed, or who qualifies in another State, and there receives assets into his hands, may be sued in the tribunals in this State

by the person or persons entitled to such assets, if he shall have removed to and settled in this State."

This case is not an authority, therefore, that a foreign executor who derives title to assets within the jurisdiction of Kentucky, *from the will*, can not be sued in Kentucky to subject those assets. Any *dictum* which may be found in the above case as to a foreign executor, is overruled by the recent case of Keiningham v. Keiningham's Executor, decided by the Kentucky Court of Appeals in 1903, after the first opinion in the case at bar had been delivered by the lower Court, and is reported in 71 S. W. R. 497 and 24 Ky. Law Rep. 1330. In that case it is held that a foreign executor can be sued in Kentucky. The opinion was delivered by Chief Justice Burnam, who states the facts as follows:

> "This action was instituted by the appellant, Jennie Moss Keiningham, against the appellee, H. F. Finley, as executor of her father, James L. Keiningham, to recover a legacy devised to her by her father's will. The father of appellant died domiciled in the District of Columbia, and his will was probated in the proper court of the District, and appellee duly qualified as executor thereof, and took possession of the devised estate. . . .
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> "It is the contention of appellee that this judgment should be affirmed for two reasons: First, because he was appointed and qualified as executor and received the assets in the District of Columbia, the domicile of testator at the time of his death; and that for this reason he can only be required to answer for the faithful discharge of his duties in the tribunals of the District of Columbia."

It is thus seen, (1) that this action was against a foreign executor, *as such;* (2) that this executor was appointed and qualified in the District of Columbia where his testator was domiciled; (3) that this executor received the assets in the District of Columbia; (4) that he objected to being sued in Kentucky. The question was, therefore, squarely presented for decision in this case. The court proceeds:

"Appellee has cited numerous authorities of great weight to support the contention that an executor can not be sued outside the jurisdiction of his appointment for a failure to carry out the trust imposed upon him, but in the early case of Dorsey's Ex'or v. Dorsey's Adm'r, 28 Ky. 280, it was held by this Court, in an opinion by Judge Underwood, that the distributee of a decedent might enforce distribution in the courts of the State of assets received by an administrator appointed in Maryland if found in this State. This case was followed by that of Atcherson's Heirs v. Lindsey, 45 Ky. 86, in which the administrator and infant heirs of John Atcherson sought to recover of James Lindsey, who administered upon the estate of decedent in South Carolina, certain assets received by him in that State. And the contention was made in that case that as Lindsey was appointed administrator in South Carolina and received the assets sued for there, he could not be held responsible in the tribunals of this State for the surplus remaining in his hands at the suit of a local administrator and infant heirs of decedent. In response to this contention the court, through Judge Marshall, after referring to the case of Dorsey's Ex'or v. Dorsey's Adm'r, quoted *supra*, said: 'Upon the express authority of this case, and under our own sense of what is required by convenience and justice, and of the comity due to the sovereignty and laws of South Carolina, we are of the opinion that the mere fact that Lindsey was appointed administrator in that State, and received there the assets for which he is now charged, does not of itself exempt him from all liability to be sued in the tribunals of this State for a claim growing out of his having thus received the assets, or the proceeds, of which the complainant, or some of them, are entitled. Whether any decree should finally be rendered against him on this account may depend upon the facts disclosed in his answer and upon the proof, but we think he was bound to answer.'

"The question was again before this court, in Manion's Admr. v. Titsworth, 57 Ky. 597, and in a well-considered opinion by Judge Simpson it was decided that it was settled doctrine in this State 'that the administrator or executor, who is appointed or who qualifies in another State, and there receives assets in his hands, may be sued in the

tribunals of this State by the persons entitled to such assets, if he shall have removed to and settled in this State.'

"It follows from these decisions that appellant was entitled to maintain this suit against the appellee to recover the balance found due in his hands after the payment of the debts of the decedent in the courts of this State, if shown entitled thereto."

This case settles, as to Kentucky, that a foreign executor can be sued, even without the attachment statutes. Then if he can be sued, he is necessarily capable of being a "defendant;" and if a "defendant who is . . . a non-resident of the State," the plaintiff may have an attachment.

In conclusion, it has been shown that under the provisions of the Kentucky Constitution and Statutes, the debt owing from the foreign corporation in the case at bar was subject to attachment.

It has been further shown that prior to the adoption of the first Code of Practice, and when the administration statutes were substantially the same as those in force to-day, the Kentucky Court of Appeals had decided that the estate of a decedent could be attached; that the only way to prevent the preference created by the attachment was to bring a settlement suit and enjoin it, that where no personal representative had qualified, the non-resident heirs, distributees or legatees could be made defendants in his stead, and the estate be attached; that a foreign executor or administrator could be sued, and that the word "defendant" in an attachment statute was intended to and did include executors and administrators. It has been further shown that all of these decisions were rendered within a period ranging from five to ten years before the adoption of the first Code of Practice, and that the adjoining States, Ohio and Indiana, and the neighboring State, Alabama, all had statutes held by their highest courts to authorize attachments against foreign executors and administrators. It was then that the Kentucky Legislature changed the language of the attachment statute which applied to non-residents, using in the Code the same word which had been held to em-

brace executors and administrators. It has been further shown that the policy of the State of Kentucky, gathered both from its legislative enactments and the decisions of its courts, is and has been to protect its own citizens as to assets within its control, and that this policy opposes their being driven to a foreign jurisdiction to enforce their demands.

It has been further shown that the executor derives title from the will to the personal estate, wherever it may be. That his right to sue and his liability to be sued in a foreign jurisdiction are not correlative, and that the same policy of Kentucky—that of protecting its own citizens as to assets within its control—which forbids his suing, requires that he be sued to prevent the withdrawal of the assets.

In the case at bar, it is alleged in the petition and confessed by the demurrer that the assets attached here are the proceeds of Kentucky real estate, and that exclusive of these assets, there are assets in the hands of the executor in Wisconsin, "more than sufficient in value to pay all of the debts of said estate, owing to the creditors of said Merritt B. Atwater outside of the State of Kentucky." This, then, like the case of Atchison's Heirs v. Lindsey, *supra*, is a suit to subject the surplus, and no injustice could be done to the Wisconsin creditors, should it be sustained; nor could any preference be created as against Kentucky creditors, for it is alleged in the petition and confessed by the demurrer that there are no Kentucky creditors other than plaintiff.

The Circuit Court was of opinion (R. 17) that appellant could obtain administration upon the decedent's estate in Kentucky, and in that way reach the assets, and for this reason the suit at bar could not be maintained. This is contrary to the decision in Hefferman v. Forward, 6 B. M., *supra*, where it was held that the creditor was not bound to provoke an administration, but could, under the statutes, attach the decedent's estate, making the non-resident widow and heirs defendants in place of the personal representative. The Court

there said that it did not regard the taking out of letters of administration "*as an ordinary legal remedy*, which should preclude the interference of the Chancellor, in behalf of the creditor, *under the statutes referred to.*" . . . "Besides the personalty might, in the meantime, be sent out of the State to the non-resident heirs, or the debt paid over to them or to some foreign administrator, and the fund, which should be made liable to the creditors here, escape from the power and jurisdiction of the Chancellor."

It is alleged in the petition and confessed by the demurrer that "unless an attachment is granted plaintiff herein, and said assets attached and subjected by the court to plaintiff's claim herein, they will be collected by said executor and withdrawn from the jurisdiction of this State and distributed in a foreign jurisdiction and plaintiff will be without remedy." It is thus seen that the event which *might* happen and, therefore, justified the attachment in Hefferman v. Forward, *will* happen in the case at bar, unless the attachment is sustained.

As has been seen, an executor can not sue in a foreign government for the technical reason that his power to sue is derived—not from the will—but from his letters testamentary, which have no extra-territorial effect. The practical reason for denying their extra-territorial effect, and thus denying the right to sue, is the policy of the government to protect its own citizens by preventing a foreign executor from withdrawing assets within its control, until he has complied with the rules prescribed by such government for carrying out that policy of protection. But neither the techical reason nor the practical reason applies to the suability of such executor in a foreign government as to assets subject to its jurisdiction, for the executor derives title to the assets *everywhere*, not from his letters testamentary, but from the will, the letters testamentary being merely *evidence* of his right to act; and where it is alleged, as in the case at bar, that he *will act*, and where it is admitted by the demurrer that he *will act* as

to assets within the control of Kentucky, and will withdraw those assets from the control of Kentucky, and distribute them in a foreign jurisdiction, then, certainly, there can be no technical nor practical reason why he should not be sued in Kentucky as to such assets. He admits that he is executor, that the title is in him, and that he will withdraw those assets from the control of Kentucky jurisdiction. He has also the unquestioned right to defend, and has exercised that right in this case by demurring to the petition on a number of different grounds.

Appellant insists that the statutes of Kentucky authorized this suit, and that it was error to dismiss it for want of jurisdiction.

Respectfully submitted,

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